IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOPE AMSPACHER, ADMINISTRATOR OF THE ESTATE OF ZACHARY KIRCHNER, and MATTHEW KIRCHNER, *Plaintiffs*,	:	NO. 1:23-cv-00286
v.	:	CIVIL ACTION
RED LION AREA SCHOOL DISTRICT, JASON M. HOFFMAN, M.A., OFFICER MARC GREENLY, L.D., a minor, D.M., a minor, T.F., a minor, C.H., a minor, W.G., a minor, and C.A., a minor, *Defendants*.	:	JURY TRIAL DEMANDED

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTIONS TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT OF DEFENDANTS OFFICER MARC GREENLY, L.D., T.F., W.G, AND THE MOTION TO SEVER OF DEFENDANT OFFICER MARC GREENLY

Renee E. Franchi, Esq. (PA #313950)
renee@vca.law
Nathaniel L. Foote, Esq. (PA #318998)
nate@vca.law
Andreozzi + Foote
4503 North Front Street
Harrisburg, PA 17110
Ph: 717.525.9124 | Fax: 717.525.9143
Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Court Rules

Other Sources

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOPE AMSPACHER, ADMINISTRATOR OF THE ESTATE OF ZACHARY KIRCHNER, and MATTHEW KIRCHNER, *Plaintiffs*,	:	NO. 1:23-cv-00286
v.	:	CIVIL ACTION
RED LION AREA SCHOOL DISTRICT, JASON M. HOFFMAN, M.A., OFFICER MARC GREENLY, L.D., a minor, D.M., a minor, T.F., a minor, C.H., a minor, W.G., a minor, and C.A., a minor, *Defendants*.	:	JURY TRIAL DEMANDED

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTIONS TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT OF DEFENDANTS OFFICER MARC GREENLY, L.D., T.F., W.G, AND THE MOTION TO SEVER OF DEFENDANT OFFICER MARC GREENLY

Plaintiffs, Hope Amspacher, Administrator of the Estate of Zachary Kirchner, and Matthew Kirchner, by their attorneys, Andreozzi + Foote, file the within Memorandum of Law in Opposition to the multiple motions filed in response to the Plaintiff's First Amended Complaint. The pending Motions are: Motions to Dismiss Plaintiffs' First Amended Complaint filed by (1) Defendant Officer Marc Greenly, (2) LD., (3) T.F., (4) W.G., as well as a (5) Motion to Sever by Greenly. In opposition thereto, Plaintiffs aver as follows:

I. INTRODUCTION

This case arises from the tragic, avoidable bullying-related suicide of a gay, autistic child, Zachary Kircher ("Zachary" or "Decedent"). For years, due to Zachary's differences, he was mercilessly bullied by his school classmates, L.D., D.M., T.F., C.H., W.G., and C.A. (collectively "Student Defendants") at Red Lion Area School District ("RLASD" or the "School District"). The School District failed to stop Zachary's bullies, which led to Zachary's death by suicide in 2021.

Of course, Zachary was not the only victim in his suicide. He left behind his mother, Hope, and an older brother, Matthew Kirchner ("Matthew" or "Plaintiff Kirchner"). Matthew was particularly destroyed by Zachary's suicide, as the Court will read.

Indeed, in a shocking turn of events, Matthew was forced to find his brother's lifeless body.

Defendants Jason Hoffman, M.A. ("Hoffman"), then an employee of the School District, and Officer Marc Greenly ("Greenly"), an employee of then-existing York Area Regional Police Department ("YARPD"), inexplicably brought Matthew to the scene of Zachary's suicide on the fateful day. Then, Greenly and Hoffman waited in another room while they left Zachary to discover his little

brother hanging by the neck, dead. By doing so, they violated Matthew's Constitutional rights, as explained below.

As this Memo lays out, Hope, as administrator of Zachary's Estate, and Matthew, in his own right, seek accountability from the people who tormented and failed Zachary and Matthew.

II. PROCEDURAL HISTORY

On April 19, 2023, Plaintiffs filed a First Amended Complaint against the Defendants (collectively "Defendants"). (*See* Doc. 18). Plaintiff's First Amended Complaint brings causes of action against the Defendants as follows:

1. Violation of 42 U.S.C. § 1983 for State Created Danger (Matthew v. Hoffman & Greenly);
2. Violation of Title IX for Sexual Harassment (Estate v. RLASD);
3. Violation of Title II of the Americans with Disabilities Act for Discrimination (Estate v. RLASD);
4. Violation of § 504 of the Rehabilitation Act for Discrimination (Estate v. RLASD);
5. Gross Negligence and/or Recklessness (Estate v. Student Defendants);
6. Intentional Infliction of Emotional Distress (Matthew v. Student Defendants);
7. [1]Intentional Infliction of Emotional Distress (Estate v. Student Defendants). (*See* Doc. 18).

In response to the First Amended Complaint, the Defendants filed various responses:

[1] What should have been numbered as Count "VII" in the First Amended Complaint was misnumbered as County "IX". For purposes of this pleading, it shall be referred to herein as Count "VII" as it is the seventh and final listed cause of action.

- RLASD and Hoffman filed an Answer to the First Amended Complaint on May 23, 2023. (*See* Doc. 37)
- Greenly filed a joint Motion to Dismiss and Motion to Sever and Brief in support thereof on May 2, 2023. (*See* Doc. 23, Doc. 24).
- T.F. filed a Motion to Dismiss and Brief in support thereof on May 3, 2023 and May 17, respectively. (*See* Doc. 26, Doc. 33).
- W.G. filed a Motion to Dismiss and Brief in support thereof on May 3, 2023 and May 17, 2023, respectively. (*See* Doc. 29, Doc. 34).
- L.D. filed a Motion to Dismiss and Brief in support thereof on May 22, 2023. (*See* (Doc. 35, Doc. 36).[2]

Due to the multiple responses, Plaintiffs filed a Motion for Extension of Time to Respond on May 15, 2023. (*See* Doc. 31). That day, this Court entered an Order granting Plaintiffs' Motion, and allowed Plaintiffs to file one (1) response to all pending and anticipated motions no later than June 30, 2023.

Plaintiffs now file this Memorandum of Law in Opposition to the Motions to Dismiss of Defendants T.F., W.G., L.D., and Greenly, and the Motion to Sever of Greenly.

III. STATEMENT OF FACTS RELEVANT TO PENDING MOTION

Background

RLASD is a K-12 regional public school district in York County, Pennsylvania. (*See* Doc. 18, ¶ 8). Red Lion Area Junior High School ("JHS") was a junior high school serving grades 7 and 8 within RLASD. Red Lion Area Senior

[2] D.M., C.H., and C.A., as of the date of this filing, have not filed responsive pleadings. On or about May 18, 2023, the mother of D.M. called the undersigned attorney's office requesting an extension of time for a response. On May 19, 2023, the undersigned attorney emailed D.M.'s mother, asking for her to let us know when she is requesting an extension until. We have received no further communication.

High School ("SHS") was a senior high school serving grades 9 through 12 within RLASD. (*Id*., ¶¶12, 13). Zachary and Matthew were students at RLASD that attended JHS and SHS. (*Id*., ¶ 9).

Hoffman was an employee of RLASD, working as a Counselor at SHS. (*Id*., ¶ 15). Greenly was a police officer and serving as the School Resource Officer ("SRO") for RLASD. (*Id*., ¶ 17). The Student Defendants also attended the RLASD and overlapped with Zachary and Matthew. (*Id*., ¶ 25).

Zachary was a student at JHS for his 8th grade year during the 2019 to 2020 school year, and then went on to be a student at SHS for his 9th grade year during the 2020 to 2021 school year until his death. (*Id*., ¶30).

While attending RLASD, Zachary suffered from several diagnoses, including but not limited to Autism Spectrum Disorder ("autism"), Attention Deficit Hyperactivity Disorder ("ADHD"), and Obsessive Compulsive Disorder ("OCD"), and was subject to an Individualized Educational Program ("IEP"). He was a special education student due to his disabilities. (*Id*., ¶ 31, 32, 38). Zachary had also come out as gay during his 8th grade year. (*Id*., ¶ 34).

Zachary's older brother Matthew was a student at SHS for his 10th and 11th grade years during the 2019 through 2021 school years, and partially during his 12th grade year during the 2021 through 2022 school year. (*Id*., ¶ 36). Thus, while Zachary and Matthew attended different schools within RLASD for the 2019 to

2020 school year, they both attended SHS during the 2020 to 2021 school year and Zachary's death. (*Id*., ¶ 38).

Relentless Bullying by Student Defendants

Soon after Zachary came out as gay during his 8th grade year, the Student Defendants preyed on Zachary as a target of their bullying. (*Id*., ¶ 39). The Student Defendants routinely called him "gay," "faggot," "gay boy," and other verbally abusive, demeaning, humiliating, and derogatory terms based on Zachary's sexual orientation and perceived effeminacy. (*Id*., ¶ 40).

At one time, for example, during class time in 8th grade, Defendant W.G. went up to Zachary with a lollipop, making sexual gestures and gay jokes at Zachary such as "I got a lollipop for you." (*Id*., ¶ 41). In another example, Defendants L.D., D.M., and T.F. repeatedly called Zachary "faggot." (*Id*., ¶ 42).

Defendants L.D., D.M., T.F., and C.A. also told Zachary to kill himself over text message and other messaging services. They made similar posts on social media for Zachary and other classmates to see. (*Id*., ¶ 43). As early as 8th grade, Zachary made it known to his bullies, the Student Defendants, that he was going to commit suicide. (*Id*., ¶ 44). Zachary even said that he would do so on a specific date: April 20. (*Id*., ¶ 44). Still, the Student Defendants publicly humiliated Zachary for his disabilities, his sexual orientation, and how he acted differently from other children. (*Id*., ¶ 45).

The Student Defendants intentionally provoked Zachary to react explosively and emotionally due to his disabilities and the constant provocation. (*Id*., ¶ 46). The Student Defendants were recklessly indifferent to Zachary's suicide risk by directly taunting Zachary to kill himself. (*Id*., ¶ 47). The Student Defendants relentlessly harassed, belittled, and broke down Zachary by not only telling him directly to "kill yourself" but also to do a "charity" for the Student Defendants by committing suicide. (*Id*., ¶ 48).

The Student Defendants' collective sexual harassment and taunts for Zachary to kill himself continued and even increased as the children entered 9th grade at SHS. (*Id*., ¶ 49).

RLASD knew about Zachary's incessant bullying due to his sexual orientation and disabilities. (*Id*., ¶ 50). For example, "Zach is a fag" was scratched in large letters into a bathroom stall door at SHS and remained there even after Zachary's death. (*Id*., ¶ 51). Appropriate RLASD officials with the authority and ability to take corrective measures either saw or were made aware of the image etched into the bathroom stall door for all to see. (*Id*., ¶ 52). Other times, Zachary would report the abuse to his teachers and RLASD officials, but they would not help him. (*Id*., ¶ 53).

Due to all this, Zachary began to openly exhibit self-harming behaviors including using knives to cut himself. (*Id*., ¶ 54). Then Zachary attempted suicide.

In or about December of 2020, during Zachary's 9th grade year and only a few months before his death, Zachary tried to kill himself by drinking nail polish remover. (*Id*., ¶ 55). He was hospitalized for multiple days while he recovered. (*Id*., ¶ 56).

RLASD had actual knowledge of Zachary's first suicide attempt. (*Id*., ¶ 57). After that suicide attempt, the relentless bullying by the Student Defendants only continued. (*Id*., ¶58). RLASD still did not stop it.

Sadly, Zachary was not the only victim, as stated above. (*Id*., ¶ 59).

Matthew witnessed Zachary's bullying by the Student Defendants. Matthew saw the visible decline in Zachary's mental health due abuse. (*Id*., ¶ 61). Matthew repeatedly voiced his concerns to RLASD. However, RLASD never intervened. (*Id*., ¶ 62).

For example, Matthew reported Zachary's abuse by the Student Defendants to RLASD schoolteachers and/or officials and asked them to intervene. (*Id*., ¶ 63). Specifically, Matthew told two (2) RLASD school officials that a group of students, including the Student Defendants, were calling Zachary a "faggot." (*Id*., ¶ 64). RLASD's school officials told Matthew to mind his own business. (*Id*., ¶ 64).

Matthew felt helpless in trying to make the abuse and bullying of his brother stop given the apparent indifference of RLASD and its officials. (*Id*., ¶ 65).

Zachary's Death by Suicide

Leading up to Zachary's suicide, he increasingly communicated his suicidal ideations to his classmates, including the Student Defendants. (*Id*., ¶ 91). For example, on April 13, 2021, only a few days before his death, Zachary sent a text message to a classmate at 9:19 A.M. stating "I'm fucking done with life." (*Id*., ¶ 92).

On the day of Zachary's suicide, the Student Defendants continued to harass, make fun of, and bully Zachary and flat out encouraged him to kill himself. (*Id*., ¶ 93).

Zachary's intentions were no secret. Indeed, the opposite. Zachary made posts on social media, including on Snapchat, between the evening of April 19, 2021, and the morning of April 20, 2021, expressing his suicidal ideations. (*Id*., ¶ 94). The Student Defendants saw Zachary's suicidal social media posts. (*Id*., ¶ 95). Nevertheless, the Student Defendants continued to bully Zachary throughout the evening and next morning, telling him to kill himself despite having seen Zachary's suicidal intent shared on social media. (*Id*., ¶ 96).

Early in the morning of April 20, 2021, Zachary's mother, Hope, left for work and Matthew left for school at SHS. (*Id*., ¶ 97). But Zachary remained at home. (*Id*., ¶ 97). Hope sent multiple text messages to Zachary that she was concerned about him and that he needed to go to school. (*Id*., ¶ 98).

At 9:20 A.M. on April 20, 2021, Zachary sent his last text message, to his mother, saying "leaving now." (*Id*., ¶ 99). Zachary, however, was not leaving for school. (*Id*., ¶ 100). Zachary never showed up to school that day. (*Id*., ¶ 101).

Concerned about her son, Hope called SHS officials and asked that the School Resource Officer, Greenly, conduct a welfare check on Zachary. (*Id*., ¶ 102).

Specifically, Hope notified the school that she was extremely concerned Zachary had harmed himself. (*Id*., ¶ 103). By this time, students within SHS, including the Student Defendants, were talking openly amongst themselves about the fact that Zachary may have harmed himself or committed suicide that morning. (*Id*., ¶ 104). Hope texted Matthew and told him to go to the school office. (*Id*., ¶ 105).

RLASD and SHS officials, Hoffman, and Greenly knew Zachary was repeatedly bullied and harassed, including by the Student Defendants, and that he had become suicidal as a result. (*Id*., ¶ 106). RLASD, SHS, Hoffman, and Greenly were fully aware that Zachary was at a significant risk of harming himself on the day of his suicide. (*Id*., ¶ 108).

Instead of going straight to Zachary's home to conduct a welfare check, Greenly and Hoffman wanted Matthew, Zachary's older brother but still a child

himself, to accompany them back to the family's house to check on Zachary. (*Id*., ¶ 109).

SHS officials pulled Matthew from class. Then, Greenly and Hoffman drove Matthew in Greenly's police vehicle back to his house. (*Id*., ¶ 110, 111).

Hoffman and Greenly directed Matthew to unlock the front door. (*Id*., ¶ 112). Instead of performing a welfare check, despite repeated requests by Hope to do so, these two adults instead directed Matthew, a child, to enter the home and search for his younger brother. (*Id*., ¶ 113). Hope begged Hoffman and Greenly not to have Matthew enter the house to look for Zachary as she feared what Matthew might find. (*Id*., ¶ 114).

Despite Hope's pleas, Greenly and Hoffman stood in the living room area of the home, just inside the front door, casually chatting and petting the dog while Matthew went upstairs to Zachary's bedroom. (*Id*., ¶ 115). Greenly and Hoffman could hear Zachary's cell phone making noises somewhere in the house, but they still did not leave the front living area to search for Zachary. (*Id*., ¶ 116).

Evidence was everywhere regarding the gruesome scene to come. Matthew found blood on the floors of the house and all over Zachary's bedroom, as well as a large kitchen knife. (*Id*., ¶ 117). After this discovery, Matthew came down from the second floor, proceeded through the living room and kitchen, past the two adults, and into the basement. (*Id*., ¶ 118).

Matthew went down the basement stairs. At the bottom, Matthew found his little brother.

Zachary was hanging from the ceiling rafter with a noose around his neck and self-inflicted knife wounds on his arm. (*Id*., ¶ 119). By then, Zachary was already dead.

Matthew immediately began screaming at the sight of his little brother hanging from the ceiling. (*Id*., ¶ 120). Matthew frantically tried to lift Zachary's lifeless body up to remove him from the noose. (*Id*., ¶ 120). Only then did Hoffman and Greenly come down the basement stairs to help Matthew take his little brother down. (*Id*., ¶ 121).

Greenly carried Zachary's lifeless body up the stairs and laid him on the kitchen floor. (*Id*., ¶ 122). After some time, Greenly covered Zachary's body with a blanket as Zachary remained on the kitchen floor. (*Id*., ¶ 123).

After witnessing Zachary's gruesome death, Matthew has suffered extreme distress and his mental health has severely declined to the point he dropped out school, and did not graduate. (*Id*., ¶ 124). Matthew has not, and will not, recover.

Continued Bullying of the Student Defendants

After Zachary's death, one would think the Student Defendants would have been chastened. Instead, the opposite occurred.

On or about April 20, 2022, on the one-year anniversary of Zachary's death, Defendant C.H. doubled down. C.H. circulated a photograph on social media of Zachary's previous yearbook photo, edited to include a piece of rope placed around Zachary's neck like a noose. (*Id*., ¶ 125). C.H. added a caption to the photo, which stated "Can't believe 1 year, rope still aint break" with a flexing arm emoji and a smiling face emoji wearing sunglasses. (*Id*., ¶ 126).

C.H.'s edited photograph was then reposted on social media multiple times by the other Student Defendants, mocking Zachary's death with humiliating comments like "Bro my homie just sent me dis lmao" with a crying laughing face emoji and "Now we gon change your way of thinking for good." (*Id*., ¶ 127).

Matthew received this horrific photograph vis-à-vis the Student Defendants mocking his little brother's suicide on the anniversary of Zachary's death – and Matthew finding his body. (*Id*., ¶ 128).

Thus, Matthew's experience of Zachary's cruel bullying by the Student Defendants continued even after Zachary's tragic death, which further caused Matthew to suffer severe emotional distress. (*Id*., ¶ 129).

Matthew's trauma has manifested in a variety of ways. (*Id*., ¶ 129). Matthew dropped out of SHS in his senior year and did not graduate. (*Id*., ¶ 130). Matthew suffered (and suffers) a variety of severe mental problems, including but not limited to, extreme mental and emotional distress, and related physical trauma,

including severe depression, post-traumatic stress symptoms, frequent nightmares, anger, stress, anxiety, intense headaches, upset stomach, and an inability to sleep. (*Id*., ¶ 131).

IV. STATEMENT OF QUESTIONS INVOLVED

a. Has the Estate sufficiently pled a cause of action in Count V against the Student Defendants for gross negligence and/or recklessness?

Suggested answer: Yes, Count V for gross negligence and/or recklessness against the Student Defendants was sufficiently pled.

b. Have the Estate and Matthew sufficiently pled causes of action against the Student Defendants for intentional infliction of emotional distress

Suggested answer: Yes, Counts VI and IX for intentional infliction of emotional distress against the Student Defendants were sufficiently pled.

c. Has Matthew sufficiently pled a violation of 42 U.S.C. § 1983 for State Created Danger against Defendant Officer Marc Greenly?

Suggested answer: Yes, Count I for State Created Danger against Defendant Greenly was sufficiently pled.

d. Is Defendant Officer Marc Greenly protected by qualified immunity?

Suggested answer: No, Defendant Greenly is not protected by qualified immunity.

e. Should Count I of Plaintiffs' First Amended Complaint against Defendant Officer Marc Greenly be severed?

Suggested answer: No, Count I against Defendant Greenly should not be severed.

V. ARGUMENT

a. Standard of Review

When ruling on a Rule (12)(b)(6) motion to dismiss, this Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Gelman v. State Farm Mut. Auto. Ins. Co.*, 583 F.3d 187, 190 (3d.Cir.2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

b. The Estate sufficiently pled a cause of action in Count V against the Student Defendants for gross negligence and/or recklessness

Defendants T.F., L.D., and W.G. (collectively the "Student Defendants") argue Zachary's Estate failed to sufficiently plead a cause of action for gross negligence and recklessness.

i. Society and our courts recognize bullying as a harm deserving of legal redress. The Student Defendants are no different.

First, the Student Defendants go so far as to say that "[n]ationwide research" has "failed to discover a recognized legal basis for these claims." (*See* Doc. 33, p. 9). This is simply not true. Society and our courts have begun to hold bullies legally accountable for suicide.

A Google search demonstrates that bullying related suicide is an ongoing and escalating issue. Courts around the US have recognized this, as explained below. The Estate has a legitimate claim for gross negligence and/or recklessness against the Student Defendants for their conduct leading to Zachary's death.

According to the Centers for Disease Control and Prevention ("CDC"), suicide is the second leading cause of death for youth and young adults aged 10 to 24 years old.[3] In 2021, more than a quarter (26.3%) of high school students identifying as lesbian, gay, or bisexual reported attempting suicide in the prior 12 months. *Id*. This rate was 5 times higher than the rate reported among heterosexual students. *Id*. In another example, Yale University study states "[b]ullying is a serious public health problem," and concludes that "participation in bullying increases the risk of suicidal ideations and/or behavior" in children.[4]

[3] https://www.cdc.gov/suicide/facts/disparities-in-suicide.html.
[4] *Bullying and suicide. A review*, Young Shin Kim, MD, MS, MPH, PhD and Bennett Leventhal, MD, Int J Adolesc Med Health 2008;20(2):133-154.

Another recent study observed a significant association between being bullied either at school or electronically with suicidality, with a stronger association for youth who experienced being bullied in both settings.[5] It further explained that:

> Bullying has typically occurred at school during school hours. However, in the era of the internet, electronic bullying or cyberbullying is commonly perpetrated through electronic communication devices, such as cell phones, email, instant messaging, and social media sites, and at all hours of the day/night. Compared to in-school bullying, cyberbullying has more potent effects in predicting suicide-related behavior.

Id.

Another recent article lists some notable cases of suicide and cyberbullying:

> In the absence of epidemiological studies, the data regarding cyberbullying and suicide derive predominantly from accounts of news stories. In 2010, the roommate of 18-year-old college student Tyler Clementi secretly live-streamed Mr. Clementi engaging in physical intimacy with another male alone in their dorm room and publicized it via messaging and Twitter. Two days later, Mr. Clementi took his life. In 2013, 12-year-old Rebecca Sedwick was extensively bullied and cyberbullied via multiple online platforms by girls from school, including her former best friends. She switched schools, but the cyberbullying continued, and after a year and a half, Ms. Sedwick took her life. In 2017, 10-year-old Ashawnty Davis confronted a girl who had been allegedly bullying her, and someone posted a video of the fight on an app called Musical.ly, prompting more bullying. Two weeks later, Ms. Davis took her life. In 2019, 16-year-old Channing

[5] *Association of In-School and Electronic Bullying with Suicidality and Feelings of Hopelessness among Adolescents in the United States*, examined the association of in-school and electronic bullying and suicide-related behavior and feelings of despair among adolescents. *See* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10136663/.

> Smith was outed as gay after explicit text messages he had exchanged with a male classmate were posted on social media; a few hours later, Mr. Smith took his life.[6]

Id.

In one of the most widely and internationally publicized cases of bullying related suicides, Michelle Carter was convicted of involuntary manslaughter for her reckless verbal conduct causing the suicide of her boyfriend, Conrad Roy. *Commonwealth v. Carter*, 115 N.E.3d 559, 481 Mass. 352 (2019) ("*Carter II*"). Carter repeatedly instructed Roy to kill himself. *Id*. The conviction was based in part on Carter overpowering his will, creating a high likelihood of substantial harm. *Id*. The crime of involuntary manslaughter proscribes reckless or wanton conduct causing the death of another. *Id.* Importantly, the court noted that "a defendant cannot escape liability just because he or she happens to use words to carry out his or her illegal act." *Id*.

A "reasonable juvenile" standard did not apply because Carter's conduct was subjectively reckless. *Id.* As the court said:

> Whether conduct is wanton or reckless is 'determined based either on the defendant's specific knowledge or on what a reasonable person should have known in the circumstances… . If based on the objective measure of recklessness, the defendant's actions constitute wanton or reckless conduct … if an ordinary normal [person] under the same

[6] Quotes from The Journal of the American Academy of Psychiatry and the Law ("JAAPL") titled Cyberbullying and Adolescent Suicide, "bullying" is defined as "any unwanted aggressive behavior(s) by another youth or group of youths who are not siblings or current dating partners that involves an observed or perceived power imbalance and is repeated multiple times or is likely to be repeated." See https://jaapl.org/content/51/1/112.

> circumstances would have realized the gravity of the danger… . If based on the subjective measure, i.e., the defendant's own knowledge, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter [his or her] conduct so as to avoid the act or omission which caused the harm.

Id. at 573, *quoting Commonwealth v. Carter*, 474 Mass. 624, 52 N.E.3d 1054 (2016) *("Carter I")* (*quotations and citation omitted*).

Obviously, the standard of proof for a criminal conviction – beyond a reasonable doubt – is much higher than that for a civil judgment. If teen bullying leading to suicide can meet the criminal burden of proof for recklessness, then it certainly would for a civil matter.

This is exactly what Zachary suffered at the hands of the Student Defendants. Zachary's bullying was not childhood games. It was torture. As the Student Defendants broke Zachary down and his mental health deteriorated, the incessant bullying by the Student Defendants only increased. The Student Defendants aggressively attacked Zachary, a known suicidal child, with embarrassing and hurtful comments in person and online and repeatedly instructed him to kill himself. Sadly, he did.

The Student Defendants' arguments are purely issues of fact. For example, they couch their abhorrent behavior as simply being "unkind," "insensitive," "insulting," and "immature" or that it was simply "insults" and jokes." In doing

so, the Student Defendants are asking this Court to violate the appropriate legal standard. All facts must be examined in a light most favorable to the Plaintiffs.

The conduct of the Student Defendants was not just "kids being kids." The Student Defendants repeatedly called Zachary, a gay autistic child, a "faggot" who they wanted to kill himself. This is not "immature" behavior; it's borderline criminal. Defendants make an improper request that this Court make factual determinations regarding the Student Defendants' conduct, which the Court cannot do. Dismissal under Fed. R. Civ. P. 12(b)(6) is not appropriate.

ii. The Student Defendants owed a legal duty to Zachary not to subject him to foreseeable harm.

Second, the Student Defendants argue the Student Defendants did not owe a duty to Zachary. This is incorrect. The Student Defendants owed Zachary a duty not to expose Zachary to reasonably foreseeable risks of injury. Nonetheless, the Student Defendants repeatedly violated this duty. They acted with an outrageous and reckless indifference to Zachary's life.

The Student Defendants hang their hat on their argument that the Student Defendants did not "owe a duty" to Zachary so, essentially, they could treat him however badly they wanted; the result would not be their fault. This is, quite simply, outrageous.

There is a general duty imposed on all persons *not to expose others to reasonably foreseeable risks of injury. Roche v. Ugly Duckling Car Sales, Inc.*,

879 A.2d 785 (Pa.Super. 2005) (*emphasis added*). The scope of the general duty of care required of all persons not to place others at an unreasonable risk of harm by way of their actions is limited to those risks that are reasonably foreseeable by the actor in the circumstances of the case. *Id*. The Student Defendants recklessly breached this duty.

The Supreme Court, quoting the Restatement (Second) of Torts, set forth the following definition for recklessness:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Tayar v. Camelback Ski Corp., 47 A.3d 1190 (Pa. 2012) (*quoting* Restatement (Second) of Torts § 500 (1965)). Gross negligence is a synonym for recklessness. *Hackerman v. Demeza*, 2016 U.S. Dist. LEXIS 43220 (M.D.Pa. 2016).

In the case at hand, the Student Defendants acted with complete disregard for Zachary's safety. The Student Defendants knew of facts which would lead a reasonable person to realize that their conduct created an unreasonable risk of harm – i.e. that Zachary was a suicidal, disabled, and gay student with deteriorating mental health from the ongoing torment. Thus, their behavior was inherently reckless.

The Student Defendants' reliance on *Althaus v. Cohen*, 756 A.2d 1166 (Pa. 2000) to argue that the Student Defendants "owed a duty to refrain from insulting another minor student" is entirely misplaced. The factors are: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution. *Id*. It should be without question that all five factors lead to the conclusion that the Student Defendants owed a duty of care to Zachary.

First, the Student Defendants were Zachary's classmates who knew of his troubles, suicidal ideations, disabilities, sexual orientation, and that he was highly reactive and growing ever-more agitated due to their conduct.

Turning to the nature of the risk imposed and the foreseeability of the harm incurred, it is entirely foreseeable that encouraging a suicidal teenager to commit suicide would lead to his death.

Next, I will address the social utility and the public interest factors together. As discussed at length above, bullying, cyber bullying and teen suicide are considered to be a public health crisis. There can be no argument that the social utility of the Student Defendants' conduct and the public interest of holding them accountable weighs in favor of a duty of care.

Finally, the consequence of imposing a duty upon the Student Defendants to not place Zachary in harm with their torment aligns with the public outcry to protect children from the torment of their bullies.

In sum, the behavior of the Student Defendants is intolerable in our society and can even be classified as contributing to a public health crisis. It was not just childish behavior as the Student Defendants would like this Court to believe. The Student Defendants had a duty not to subject Zachary to harm. They violated this duty when they acted with reckless indifference to the risk of harm to Zachary when they bullied a clearly suicidal, disabled, and gay teenager, encouraging him to take his own life until sadly, he did. This is in line with the growing, international trend to finally hold bullies responsible for their actions in contributing to the suicide of their peers.

Finally, the Student Defendants not only improperly ask this Court to consider facts not contained in Plaintiffs' First Amended Complaint, but the Student Defendants additionally request that this Court hold Plaintiffs to a higher burden than what is required by the law. Thus, the Student Defendants' attempt to bootstrap a factual dispute to its Motion pursuant to Fed. R. Civ. P. 12(b)(6) must fail, and Defendants' Motion must be denied.

c. The Estate of Zachary and Matthew both sufficiently pled causes of action against the Student Defendants for intentional infliction of emotional distress

The Student Defendants next argue that the Estate and Matthew both failed to sufficiently plead a cause of action of intentional infliction of emotional distress ("IIED"). Similar to their previous argument, this argument also relies on misstatements of fact to make it appear as though the conduct of the Student Defendants was only "schoolyard insults," and therefore would not be regarded as extreme and outrageous. As set forth at length above, this argument is simply false. Additionally, this argument asks this court to make determinations of fact which is impermissible when ruling on a 12(b)(6) motion. For the reasons as set forth herein, the Student Defendants' arguments are meritless and therefore, their Motions to Dismiss must be denied on this point as well.

Under Pennsylvania law, to establish a claim for intentional infliction of emotional distress, "the conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Hoy v. Angelone*, 720 A.2d 745, 754 (Pa. 1998) (*quoting Buczek v. First Nat'l Bank of Mifflintown*, 531 A.2d 1122, 1125 (Pa. 1987)). For liability to be imposed, there must be "knowledge on part of the actor that *severe emotional distress is substantially certain to be produced by his conduct. Hoffman v. Memorial*

Osteopathic Hosp., 492 A.2d 1382, 1386 (Pa.Super. 1985), *quoting Forster v. Manchester*, 189 A.2d 147, 151 (Pa.Super. 1963) (*emphasis in original*). The standard is not satisfied by allegations of "insults, indignities, threats," or other similar conduct. *Reimer v. Tien*, 514 A.2d 566, 569 (Pa.Super. 1986), *quoting* Restatement (Second) of Torts § 46, comment (d)).

As discussed above, the conduct of the Student Defendants was not merely just insults, indignities, or threats. Relentless bullying to the point of suicide is a serious public health problem. For the sake of brevity and to avoid repetition, the Estate and Matthew rely on the arguments set forth above to demonstrate that the Student Defendants' conduct was outrageous, extreme, beyond all possible bounds of decency, and are utterly intolerable in society.

The Student Defendants try to draw parallels between the case at hand and other cases, such as *O.P. v. Scranton Sch. Dist*, 2012 U.S. Dist. LEXIS 151 (M.D.Pa. Jan. 6, 2012). The behavior of the children in *O.P.* is not factually analogous to the horrific treatment that Zachary was subjected to leading up to his death. Moreover, the plaintiff in *O.P.* was not disabled, a member of the LGBTQIA+ community, nor had O.P. attempted suicide in the past. It is impossible to argue that Zachary did not suffer from emotional distress at the hands of the Student Defendants when he was instructed to kill himself and he, in fact, did.

The next fatal flaw is the factual misstatement that Zachary was only subjected to childish play. As we know, this is simply not true. Zachary was a disabled, gay, and suicidal child. As the bullying progressed, Zachary's already tenuous mental health deteriorated at an alarming rate. This, however, did not deter the Student Defendants. In fact, it only fueled their horrific behavior. It was in no-way analogous to the childish taunting in O.P.'s case.

Moreover, Matthew was forced to witness his brother's ongoing torment, mental decline, self-harming behavior, and eventual death. The Student Defendants were so callous that they did not stop with Zachary's death. They continued their incessant bullying upon Matthew. Matthew was forced to leave high school to avoid the Student Defendants.

Finally, as shown above, the Student Defendants attempt to hide behind the lens of only being children and therefore they are not responsible for their actions. The Student Defendants were high-school students. They knew exactly what they were doing. The fact that they were "children" does not shield them from being held responsible for the part they played in Zachary's death and Matthew's suffering. *See generally Carter,* 115 N.E.3d 559.

Finally, the Student Defendants make a bald claim that the Estate and Matthew failed to plead facts to establish a claim against each individual Student Defendant.

At this stage, Fed. R. Civ. P. 8(a)(2) only requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the… claim is and the grounds upon which it rests." *Id*. (*quoting Twombly*, 550 U.S at 555). When ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Id*.

It was established that the Student Defendants' each specifically contributed to Zachary's ongoing bullying and suicide, and Matthew's anguish, and gave examples of the manner in which each Student Defendant did so. That is all that is required at this stage. The Student Defendants not only improperly ask this Court to consider facts not contained in Plaintiffs' First Amended Complaint, but the Student Defendants additionally request that this Court hold Plaintiffs to a higher burden than what is required by the law. As such, the Motions to Dismiss should be denied.

d. Plaintiff Matthew Kirchner sufficiently pled a cause of action for State Created Danger pursuant to 42 U.S.C. § 1983 against Defendant Greenly

Greenly first argues that Matthew's claim 42 U.S.C. § 1983 State Created Danger claim should be dismissed.

Greenly makes two arguments: (1) Matthew failed to sufficiently plead a § 1983 State Created Danger claim against Greenly, and (2) that Greenly is protected

by qualified immunity. For purposes of clarity, these two arguments will be addressed separately.

i. Plaintiff Matthew Kirchner pled enough facts for the Court for the Court to find Greenly violated § 1983.

Greenly's argument is that "Plaintiff has failed to allege sufficient facts to show that [Greenly] acted in a way that amounts to state created danger." (*See* Doc. 24, p. 5). Greenly, however, fails to evaluate the four (4) required prongs to support a State Created Danger claim. As set forth herein, Matthew readily meets the burden of all four (4) prongs of the required test. Therefore, Greenly's argument on this point fails.

The threshold question in any § 1983 lawsuit is whether the plaintiff has sufficiently alleged a deprivation of a constitutional right. *L.R. v. School Dist. of Philadelphia*, 836 F.3d 235, 241 (3d Cir. 2016). In this Circuit, to prevail on a state-created danger claim, a plaintiff must meet four (4) elements:

1. the harm ultimately caused was foreseeable and fairly direct;

2. a state actor acted with a degree of culpability that shocks the conscience;

3. a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and

4. a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Id. at 242.

Here, Matthew can readily meet each element, which will be addressed in turn below. For the reasons discussed, this Court should deny Greenly's Motion to Dismiss as to Matthew's State Created Danger claim.

ii. The harm suffered by Matthew was foreseeable and fairly direct

To determine if a jury can find in Matthew's favor on this first element, this Court must decide whether "the harm ultimately caused was a foreseeable and fairly direct result of" Greenly's actions. *L.R.*, 836 F.3d at 242. This first element asks whether Greenly's conduct created or increased the risk of danger to Matthew. "It is the misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause." *Id*. To meet this test, Matthew must show "an awareness on the part of [Greenly] that rises to the level of actual knowledge or an awareness of risk that is sufficiently concrete to put [Greenly] on notice o the harm." *Id*. To determine whether Greenly had such knowledge or awareness, this Court may consider "ordinary common sense and experience." *Id*.

Here, the risk to Matthew was obvious. As explained fully herein, Zachary was a disabled student with a known *recent* history of self-harming behaviors, suicidal ideations, and reactive disruptive behavior and was at a significant risk of harming himself. (*See* Doc. 18, ¶¶ 31, et seq.). Greenley was thoroughly familiar with Zachary's history, so Greenly was well aware of the risk and likelihood that

Zachary had seriously harmed himself – or even committed suicide – on the morning of April 20, 2021. Indeed, that day, the very purpose of Hope's requested welfare check was a concern Zachary had hurt himself, if not killed himself. Greenly, however, demonstrated a history of blatant and deliberate indifference as the SRO towards Zachary's sufferings and pleas for help.[7]

By the time that Greenly decided to remove minor child, Matthew, from school on the morning of April 20, 2021, the children within the school were openly talking about Zachary harming himself that morning. Again, Hope communicated her fears that Zachary may have harmed himself or committed suicide to Greenly and RLASD that very day. (*See* Doc. 18, ¶¶ 102-103).

Worse still, despite these known risks, Greenly transported Matthew – a child – out of school during class hours, off the SHS campus, and against the pleas of Matthew's mother. Greenly then did nothing but stand there as he directed Matthew look for his little Brother Zachery. This conduct affirmatively led to Matthew's discovery of his brother's lifeless and mutilated body. (*See* Doc. 18, ¶¶ 115-121).

As shown on Greenly's body-worn camera, Matthew is clearly distressed entering the home, searching for his brother. Greenly, however, casually stands around, chatting with Hoffman and petting Matthew's dog, while the child

[7] This will be further developed during the discovery process.

desperately searches for Zachary. In other words, either out of pure laziness, deliberate indifference, or simply just cruelty, Greenly refused to perform his job duties and affirmatively forced a minor child to conduct the welfare check on Zachary instead. (*See* Doc. 18, ¶¶ 113-121). As is clearly seen on Greenly's body worn camera, Matthew's distress is palpable. As he sobs in Greenly's arms, Matthew is inconsolable. These events caused irreparable and permanent harm to Matthew.

It is clearly established that a state actor may not bring a private citizen into a dangerous situation where state actors are aware of the risk of serious harm and are responsible for creating the opportunity for that harm to happen. The risk of harm in directing a minor child to perform a welfare check on his suicidal younger brother was and is obvious. All of the above is sufficient for this Court to determine that Greenly should have foreseen the harm on Matthew. Therefore, Matthew has met the first element.

iii. Greenly's conduct in bringing about Matthew's harm shocks the conscience

On the second element of state created danger, this Court must decide whether Greenly's affirmative actions "were so outrageous . . . [they] may fairly be said to shock the contemporary conscience." *L.R.*, 836 F.3d at 246. To make this determination, the Court must first determine the "context in which the action takes place." *Id*. Where, as here, "deliberation is possible and officials have the time to

make 'unhurried judgments' . . . deliberate indifference is sufficient."[8] In this Circuit, deliberate indifference equates to a "conscious disregard of a substantial risk of serious harm." *Id*. Actual knowledge of risk is not required when "the risk is so obvious that it should be known." *Id*.

The same facts that support a finding that the harm to Matthew was "foreseeable and fairly direct" also apply to this element. As stated, Greenly knew Zachary previously attempted suicide, that he was in mental distress, and that Zachary had more than likely seriously harmed himself in the home that morning (*See* Doc. 18, ¶¶ 102-103). This knowledge was further supported by the frantic pleas of Hope that Greenly, not Matthew, enter her home and perform a welfare check on Zachary. (*See* Doc. 18, ¶¶ 113-115). Common sense dictates that Greenly's behavior in sending Matthew, a minor child, to perform a welfare check on his little brother was deliberately indifferent to Matthew's rights. The second element is clearly met.

iv. Matthew was a foreseeable victim

To meet state created danger's third element, "some sort of relationship [needs to] exist between [Greenly] and [Matthew]." This element is obviously met. Greenly was a SRO who worked within RLASD and, specifically, SHS

[8] "Intent to harm" is required in "hyperpressurized environments," i.e. a police chase. This context plainly does not apply to this case and will not be discussed.

where Matthew and Zachary were students. (*See* Doc. 18, ¶¶ 16-17). Moreover, Greenly is a member of the RLASD Board of Directors and, upon information and belief, served in that capacity at the time in question. Greenly was well aware of Zachary's history and that there was a substantial likelihood that Zachary had either harmed himself or committed suicide in the home that morning and was asked by Hope that Greenly, a police officer, perform a welfare check on Zachary. (*See* Doc. 18, ¶¶ 102-103).

Matthew was in class in SHS that morning. (*See* Doc. 18, ¶¶ 105 & 110). Greenly removed Matthew from the school the morning of April 20, 2021, drove Matthew to the house, and then directed Matthew to search for his brother in the home. (*See* Doc. 18, ¶¶ 112-121). It was highly foreseeable to Greenly that Matthew would discover something horrific within the home. In other words, Matthew was a foreseeable victim and therefore, the third element is met.

v. Greenly affirmatively used his authority to create a danger to Matthew

To meet the fourth element, this Court must decide whether Greenly's "conduct created or increased the risk of danger to [Matthew]." *LR*, 836 F.3d 235. Essentially, this Court must determine if Greenly "rendered [Matthew] more vulnerable to danger than had [Greenly] not acted at all," i.e. did Greenly upset the "status quo." *Id.*

This element is obviously met. Absent Greenly's affirmative conduct, Matthew would not have been removed from school on April 20, 2021, driven home, and then discovered his younger brother's lifeless, hanging, cut, and bleeding body.

Prior to Greenly's involvement, the "status quo" was Matthew was attending school on the day of April 20, 2021. By removing Matthew from SHS, Greenly took responsibility for Matthew's wellbeing and thereafter abandoned it by directing Matthew to find his brother's body. Greenly should have performed the welfare check on Zachary as a police officer without involving a minor child. As such, Matthew can meet the fourth element of her state created danger claim.

e. Defendant Greenly is not protected by qualified immunity

Greenly's next argument is that he is protected by qualified immunity. This argument is similarly brief and unsupported. Greenly simply states Matthew has "not plead anything which would overcome … qualified immunity." Greenly's argument is solely based on his say-so and a version of the facts Greenley asks the Court to view in a light most favorable to *Greenly*. By doing so Greenly asks this Court to violate the standards applied to a 12(b)(6) motion.

Greenly's factual argument shows this Court a genuine dispute of material fact exists. As set forth herein, Greenly is not protected by qualified immunity. Greenly's argument on this point also fails.

"Qualified immunity shields officials from civil liability 'insofar as their conduct does **not** violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Dennis v. City of Phila*., 19 F.4th 279, 283 (3d Cir. 2021) (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Thus, "[w]hen properly applied, [qualified immunity] protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Spady v. Bethlehem Area School Dist*., 800 F.3d 633, 637 (3d. Cir. 2015) (*quoting Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)) (*second alteration in original*).

When analyzing a qualified immunity claim, the Court must consider a two-prong test: (1) whether the plaintiff sufficiently alleged the violation of a constitutional right, and (2) whether the right is 'clearly established' at the time of the official's conduct. *Dennis*, 19 F.4th at 283, (*citing L.R.*, 836 F.3d at 241)). "Courts may begin their consideration with either prong." *Spady*, 800 F.3d at 637 (*citing Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

Here, Matthew can readily meet each element, which will be addressed in turn below. For the reasons discussed, this Court should deny Greenly's Motion to Dismiss as Greenly is not protected by qualified immunity.

i. Matthew sufficiently alleged the violation of a constitutional right

As explained fully above, Matthew sufficiently alleged a violation of his constitutional right to be free from unjustified intrusion upon his physical and emotional well-being under the 14th Amendment. *See generally L.R.*, 836 F.3d 235. For the sake of brevity and to avoid repetition, Matthew relies on the argument set forth herein that shows the first element of this test has been met.

ii. Matthew's constitutional right is 'clearly established' at the time of Greenly's conduct

Greenly's qualified immunity argument fails if Matthew's violated right here was "clearly established" at the time of Greenly's conduct. "A right is clearly established is whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). It is not necessary that there be "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741.

In the Third Circuit, Matthew's rights were clearly established by 2021. As the Third Circuit explained in 2016 in discussing qualified immunity, "[exposing a young child to an obvious danger is the quintessential example of when qualified immunity should not shield a public official from suit." *L.R*, 836 F.3d at 250.

In *L.R. v. Sch. Dist. of Phila*., the Third Circuit was faced with a similar issue as this Court; state-created danger and qualified immunity in a unique factual

context involving grievous harm to a child. *L.R.*'s guidance is thus helpful. In *L.R.*, a teacher allowed a child to leave school with a stranger, who then sexually assaulted her and left her crying in a playground. *Id*. The court found qualified immunity did not apply. *Id.* The Third Circuit explained a plaintiff need not show the "very action in question has previously been held unlawful" to overcome qualified immunity. *Id*. Rather, the question is "whether it would be clear to a reasonable officer" that conduct was "unlawful under the circumstances." *Id*. Letting a little girl leave school with a stranger was obviously dangerous.

The Third Circuit cited other examples where public officials conduct vis-à-vis children overcame qualified immunity. For example, in *White v. Rochford*, the Seventh Circuit held that police officers who "abandon children and leave them in health-endangering situations after having arrested their custodian and thereby deprived them of adult protection" violate the children's "right to be free from unjustified intrusions upon physical and emotional well-being." 592 F.2d 381 (7th Cir. 1979). In *White*, the harm to the children was comparatively minimal[9] to Matthew's trauma here, and still, leaving children alone to suffer *at all* was enough for the Seventh Circuit.

[9] The children in *White v. Rocheford* were left out in the cold and had to cross lanes of traffic before being rescued, but otherwise had no known injuries.

In the suicide context, the Tenth Circuit held *decades* ago that a state-created danger claim arose where school officials sent a student home after he was acting up in school, despite knowing that he was having suicidal thoughts, he had access to firearms in his house, and his parents were not home. *Armijo by and through Chavez v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1264 (10th Cir. 1998). Here, though the plaintiff is Matthew, who discovered the suicide rather than committed it, the logic is the same; officials knew this conduct was "clearly established" as unlawful by 2021.

As in *L.R. v. Sch. Dist. of Phila.*, the right is the right of a child, Matthew, to be free from the unreasonable intrusion upon his physical and emotional well-being by a state actor, Greenly. The violation of Matthew's constitutional right occurred when Greenly took custody of Matthew and placed him in a obviously dangerous situation that would not have existed but for Greenly's affirmative conduct.

It is should have been clear to Greenly that it would be considered unlawful for him to place a child in danger. Greenly knew the serious likelihood of harm in the situation he was placing Matthew in. Again, the very purpose of Greenly's visit to the home that day was fear of Zachary's suicide. As such, qualified immunity does not apply.

Viewing the facts in the light most favorable to Matthew, the Court should decide that Greenly, by his deliberate indifference, affirmatively created a danger to Matthew that caused him much harm.

Matthew has sufficiently alleged a violation of a constitutional right, which was clearly established at the time of Greenly's conduct. In sum, Greenly is not entitled to qualified immunity, and Greenly's Motion to Dismiss must be denied.

f. Plaintiff Matthew Kirchner's cause of action against Defendant Greenly should not be severed

Greenly next argues that Count I of Plaintiffs' First Amended Complaint alleging a violation of 42 U.S.C. § 1983 for State Created Danger should be severed. Greenly argues, without supporting legal authority, that it would be "highly prejudicial" and "would not promote an expeditious resolution of the matter" should the Plaintiffs' claims proceed as one action. Greenly's argument is unpersuasive, unsupported, and simply incorrect for reasons stated below.

Severance is only appropriate when the claims are "discrete and separate," each capable of resolution without dependence or effect on the other. *Henderson v. Mahally*, _F.Supp.3d_, 2022 U.S. Dist. LEXIS 203693 (M.D.Pa. 2022) (*quoting Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 442 (7th Cir. 2006)) (*citations omitted*).

The United States Court of Appeals for the Third Circuit has not established specific parameters for deciding a motion to sever claims. But District courts often

consider (1) whether the issues sought to be severed are significantly different from one another and would require distinct evidentiary proof; (2) whether severance would promote judicial economy; and (3) whether either party will be unduly prejudiced by severance or its absence. *See Official Comm. of Unsecured Creditors v. Shapiro*, 190 F.R.D. 352, 355 (E.D. Pa. 2000) (*citation omitted*).

Each factor leans strongly against severing Greenly's claim.

As to the first factor, *the issues sought to be severed are not significantly different from one another and would certainly not require distinct evidentiary proof*. First, Greenly and Hoffman are both named as responding defendants to the allegations contained in Count I and, by their very nature, these claims are overlapping. Additionally, discovery surrounding (1) Greenly's relationship with Zachary and his family, (2) Greenly's ongoing indifference to Zachary's suffering at the hands of the Student Defendants and failures of RLASD, (3) the response of SHS and Greenly the morning of April 20, 2021, (4) what occurred at SHS prior to the two men taking Matthew back to his home, (5) the two men casually chatting while Matthew frantically looked for his brother, and (6) the events that transpired therefrom are, without argument, overlapping. Therefore, Greenly's claim is inarguably intertwined with that of the other named defendants and should not be severed.

Greenly, however, goes a step further and argues the allegations against Greenly do not stem from the same facts or occurrences as those against the other named Defendants. (*See* Doc. 24, p. 9). Greenly even states discovery on Count I "does not in any way overlap the inquiries which must be made in the remaining counts during discovery." (*Id.*). This is simply not true. As discovery develops, it will come to light that Greenly was more involved in Zachary's tragic experience than he leads this Court to believe. Greenly was the School Resource Officer ("SRO") at RLASD[10] while Zachary and Matthew were students. Greenly not only was a witness to the ongoing and unending bullying of Zachary by the Student Defendants, but as a sworn police officer he failed to intervene in any way to protect Zachary.

Discovery will show that in Greenly's role within RLASD that he was specifically asked by both Zachary and Matthew to help Zachary. He still chose to do nothing. It was this deliberate indifference – and arguably outright hostility - to the sufferings of Zachary and his family's pleas for help that undoubtedly led to Greenly's decision to put Matthew in danger on the date of Zachary's death. Therefore, the first factor leans heavily in favor of *not* severing the claims.

[10] It is also worth noting that "Mr. Marc Greenly" is currently listed as the "Vice-President" of Region I of RLASD which covers Red Lion Borough with a RLASD email address. *See* RLASD list of Members, attached hereto as Exhibit A.

As to the second factor, *severance would not promote judicial economy*. As explained above, the ongoing factual scenario and relationship between parties and witnesses leading up to, and following Zachary's death are inextricably intertwined. Severance of Greenly's claim would not promote judicial economy. To the contrary, it would only serve to complicate the matter further and require, at the very least, duplication of most discovery efforts. Therefore, the second factor also supports not severing the claims.

As to the third and final factor, *no party will be unduly prejudiced by the absence of severance, however, Plaintiffs will be unduly prejudiced by severance*. Although Greenly baldly states that proceeding together would be "highly prejudicial," he gives no explanation as to how, or in what way, he would suffer prejudice should the claims remain together.

Defendants are not entitled to a severance merely because they may have a better chance of acquittal in separate trials or because the evidence is different as to each defendant. *United States v. Atwell*, 2015 U.S. Dist. LEXIS 58418, *17 (D.N.J. 2015). Because differing levels of evidence are inherent in joint trials, "[p]rejudice should not be found in a joint trial just because all evidence adduced is not germane to all counts against each defendant or some evidence adduced is more damaging to one defendant than others." *United States v. Console*, 13 F.3d 641, 655 (3d Cir. 1993).

As evident from the foregoing, the only parties who would be prejudiced should these matter be severed are Plaintiffs. Greenly cannot simply claim "prejudice" because evidence against some named defendants can be different from, or more damaging than, evidence against some others. Therefore, the third factor also fails to support severance of the claims.

In sum, a defendant has "a heavy burden in gaining severance." *United States v. Quintero*, 38 F.3d 1317, 1343 (3d Cir. 1994). Severance is not appropriate when the same or substantially the same evidence will be presented in both trials. *Id*. Absent any exacerbating circumstances, the Court will not find severance in such a scenario to be appropriate. *See Atwell*, 2015 U.S. Dist. Lexis 58418 at *17 (*citing United States v. Adams*, 759 F.2d 1099, 1112 (3d Cir. 1985)) (the court need not sever any defendant's trial unless the evidence is so complex or confusing that the jury would be unable to make individual determinations about guilt for each of the defendants).

Greenly has not met his heavy burden in gaining severance. Greenly has failed to show that he has met the requirements of any of the three (3) factors in favor of severance. Moreover, his claims are unsupported by any legal authority. Finally, the allegations against Greenly's are undisputedly intertwined with those against the other named defendants. Therefore, these matters should not be severed.

VI. CONCLUSION

WHEREFORE, as explained above, Defendants' Motions to Dismiss and Motion to Sever must be denied. In the alternative, if this Court deems Plaintiffs' First Amended Complaint to be insufficiently pled, Plaintiffs request this Court allows Plaintiffs to amend to cure any deficiencies.

Dated: June 30, 2023

/s/ Renee E. Franchi, Esq.
Renee E. Franchi, Esq. (PA #313950)
renee@vca.law
Nathaniel L. Foote, Esq. (PA #318998)
nate@vca.law
Andreozzi + Foote
4503 North Front Street
Harrisburg, PA 17110
Ph: 717.525.9124 | Fax: 717.525.9143
Attorneys for Plaintiffs

EXHIBIT A

Members

Mr. Stephen Simpson President Region III simpsons@rlasd.net Term Expires 2025	Mr. Marc Greenly Vice-President Region I greenlyml@rlasd.net Term Expires 2023
Mr. John R. Blevins Region III blevinsj@rlasd.net Term Expires 2025	Mrs. Christine Crone Region II cronece@rlasd.net Term Expires 2025
Mrs. Donna Haywood Region I haywooddw@rlasd.net Term Expires 2025	Mr. Kelly Henshaw Region I henshawka@rlasd.net Term Expires 2023
Mrs. Carol McGinn Region III mcginnc@rlasd.net Term Expires 2023	Mrs. Carolyn Sedora Region II sedorac@rlasd.net Term Expires 2023
Mr. Troy Engle Region II englet@rlasd.net Term Expires 2023	Miss Sofia Beard Student Representative
Mrs. Stephanie Sciortino (non-member) Treasurer	Mrs. Tonja J. Wheeler (non-member) Secretary

Members

Agendas/Minutes

Right-To-Know

Meeting Schedule

Board Policy

Board of School Directors Meeting details

Region I - Red Lion Borough
Region II - Windsor Borough and Windsor Township
Region III - Felton Borough, Winterstown Borough, Chanceford Township, Lower Chanceford Township, North Hopewell Township

CERTIFICATE OF SERVICE

I, Malinda A. Elliott, MLS, Pa.C.P., of the law firm of Andreozzi + Foote, hereby certify that I served the foregoing document on the individuals as listed below via ECF and/or first class mail.

David J. MacMain, Esquire Tricia M. Ambrose, Esquire MacMain Leinhauser PC 433 W. Market Street Suite 200 West Chester, PA 19382 dmacmain@macmainlaw.com tambrose@macmainlaw.com *Counsel for Red Lion School District and Jason Hoffman*	Anthony R. Sherr, Esquire Sherr Law Group, LLC 101 West Airy Street Suite 100 Norristown, PA 19401 tsherr@sherrlawgroup.com *Counsel for Officer Greenly*
Carrie E. Evans, Esquire Jason Confair, Esquire Saxton & Stump, LLC 280 Granite Run Drive Suite 300 Lancaster, PA 17601 cee@saxtonstump.com jconfair@saxtonstump.com *Counsel for WG*	Michael B. Scheib, Esquire James F. Logue, Esquire Griffith, Lerman, Lutz & Scheib 110 South Northern Way York, PA 17402 Mscheib@gslsc.com jlogue@gslsc.com *Counsel for WG*
Anthony T. Lucido, Esquire Jason A. Statler, Esquire Johnson, Duffie, Stewart & Weidner 301 Market Street, PO Box 109 alucido@johnsondiffie.com jasonstatler@johnsonduffie.com *Counsel for LD*	Rolf E. Kroll, Esquire Claire A. Murtha, Esquire Margolis Edelstein 214 Senate Avenue, Suite 402 Camp Hill, PA 17011 rkroll@margolisedelstein.com cmurtha@margolisedelstein.com *Counsel for TF*
Cayden Axe c/o Primanti Brothers 2151 S. Queen Street York, PA 17402	C.H. via first class mail to address where Summons was served
D.M. via first class mail to address where Summons was served	

ANDREOZZI + FOOTE

Date: 6/30/2023

/s/ Malinda A. Elliott
Malinda A. Elliott, MLS, Pa.C.P.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOPE AMSPACHER, ADMINISTRATOR OF THE ESTATE OF ZACHARY KIRCHNER, and MATTHEW KIRCHNER, *Plaintiffs*,	:	NO. 1:23-cv-00286
v.	:	CIVIL ACTION
RED LION AREA SCHOOL DISTRICT, JASON M. HOFFMAN, M.A., OFFICER MARC GREENLY, L.D., a minor, D.M., a minor, T.F., a minor, C.H., a minor, W.G., a minor, and C.A., a minor, *Defendants*.	:	JURY TRIAL DEMANDED

PLAINTIFFS' RESPONSE OPPOSITION TO THE MOTIONS TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT OF DEFENDANTS OFFICER MARC GREENLY, L.D., T.F., W.G, AND THE MOTION TO SEVER OF DEFENDANT OFFICER MARC GREENLY

Plaintiffs, Hope Amspacher, Administrator of the Estate of Zachary Kirchner, and Matthew Kirchner, by their attorneys, Andreozzi + Foote, files the within Response in Opposition to the multiple motions filed in response to the Plaintiffs' First Amended Complaint[1], and in support thereof, directs all Defendants and this Court to Plaintiffs' Memorandum of Law in Opposition to the Motions to Dismiss Plaintiff's First Amended Complaint of Defendants Officer

[1] The pending Motions are: (1) Motions to Dismiss Plaintiffs' First Amended Complaint filed by Defendants (1) Officer Marc Greenly, (2) LD., (3) T.F., (4) W.G., as well as a (5) Motion to Sever by Defendant Greenly.

Marc Greenly, L.D., T.F., W.G. and the Motion to Sever of Defendant of Officer Marc Greenly, filed contemporaneously with this Document.

Plaintiffs' Memorandum of Law in Opposition to the Motions to Dismiss Plaintiff's First Amended Complaint of Defendants Officer Marc Greenly, L.D., T.F., W.G. and the Motion to Sever of Defendant of Officer Marc Greenly fully comprises the response of the Plaintiffs'.

Dated: June 30, 2023

/s/ Renee E. Franchi, Esq.
Renee E. Franchi, Esq. (PA #313950)
renee@vca.law
Nathaniel L. Foote, Esq. (PA #318998)
nate@vca.law
Andreozzi + Foote
4503 North Front Street
Harrisburg, PA 17110
Ph: 717.525.9124 | Fax: 717.525.9143
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Malinda A. Elliott, MLS, Pa.C.P., of the law firm of Andreozzi + Foote, hereby certify that I served the foregoing document on the individuals as listed below via ECF and/or first class mail.

David J. MacMain, Esquire Tricia M. Ambrose, Esquire MacMain Leinhauser PC 433 W. Market Street Suite 200 West Chester, PA 19382 dmacmain@macmainlaw.com tambrose@macmainlaw.com *Counsel for Red Lion School District and Jason Hoffman*	Anthony R. Sherr, Esquire Sherr Law Group, LLC 101 West Airy Street Suite 100 Norristown, PA 19401 tsherr@sherrlawgroup.com *Counsel for Officer Greenly*
Carrie E. Evans, Esquire Jason Confair, Esquire Saxton & Stump, LLC 280 Granite Run Drive Suite 300 Lancaster, PA 17601 cee@saxtonstump.com jconfair@saxtonstump.com *Counsel for WG*	Michael B. Scheib, Esquire James F. Logue, Esquire Griffith, Lerman, Lutz & Scheib 110 South Northern Way York, PA 17402 Mscheib@gslsc.com jlogue@gslsc.com *Counsel for WG*
Anthony T. Lucido, Esquire Jason A. Statler, Esquire Johnson, Duffie, Stewart & Weidner 301 Market Street, PO Box 109 alucido@johnsondiffie.com jasonstatler@johnsonduffie.com *Counsel for LD*	Rolf E. Kroll, Esquire Claire A. Murtha, Esquire Margolis Edelstein 214 Senate Avenue, Suite 402 Camp Hill, PA 17011 rkroll@margolisedelstein.com cmurtha@margolisedelstein.com *Counsel for TF*
Cayden Axe c/o Primanti Brothers 2151 S. Queen Street York, PA 17402	C.H. via first class mail to address where Summons was served
D.M. via first class mail to address where Summons was served	

ANDREOZZI + FOOTE

Date: 6/30/2023

/s/ Malinda A. Elliott
Malinda A. Elliott, MLS, Pa.C.P.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOPE AMSPACHER, ADMINISTRATOR OF THE ESTATE OF ZACHARY KIRCHNER, and MATTHEW KIRCHNER, *Plaintiffs*,	:	NO. 1:23-cv-00286
v.	:	CIVIL ACTION
RED LION AREA SCHOOL DISTRICT, JASON M. HOFFMAN, M.A., OFFICER MARC GREENLY, L.D., a minor, D.M., a minor, T.F., a minor, C.H., a minor, W.G., a minor, and C.A., a minor, *Defendants*.	:	JURY TRIAL DEMANDED

ORDER

IT IS HEREBY ORDERED that the Defendants' Motions to Dismiss as identified below are DENIED.

- Defendant Greenly's Motion to Dismiss is DENIED.
- Defendant T.F.'s Motion to Dismiss is DENIED.
- Defendant W.G.'s Motion to Dismiss is DENIED.
- Defendant L.D.'s Motion to Dismiss is DENIED

Furthermore, the Motion to Sever filed by Defendant Greenly is hereby DENIED.

_____

(J.)